UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CHRISTINA DIAZ,	§	
	§	
Plaintiff,	§	
VS.	§	CIVIL ACTION NO. H-10-2227
	§	
UNIVERSITY OF TEXAS M.D. ANDERSON	§	
CANCER CENTER, *et al*,	§	
	§	
Defendants.	§	

OPINION AND ORDER

Pending before the Court is Defendants Gerald Falchook, M.D. ("Falchook"), Susan R. Pilat ("Pilat"), and Razelle Kurzrock, M.D.'s ("Kurzrock") Motion for Summary Judgment (Doc. 15), as well as Plaintiff Christina Diaz's ("Diaz") Response (Doc. 18), Defendants' Reply (Doc. 20), and Diaz's Sur-reply (Doc. 23). Upon review and consideration of this motion, the response, reply and sur-reply thereto, the relevant legal authority, and for the reasons explained below, the Court finds that Defendants' motion should be granted.

I. Background and Relevant Facts

This is an action brought under the Fair Labor Standards Act ("FLSA"). 29 U.S.C. § 201 *et seq*. Plaintiff Diaz worked at M.D. Anderson Cancer Center ("M.D. Anderson") as a Clinical Studies Coordinator ("CSC") from November 9, 2009 to April 21, 2010. (Doc. 8 ¶ 17; Doc. 18 at 2.) Diaz alleges she routinely worked in excess of forty hours per workweek without receiving overtime wages. (Doc. 8 ¶ 13.) Diaz further alleges that Defendants retaliated against her for complaining about unpaid overtime. (*Id.* ¶ 17.) On December 22, 2009, Diaz complained about her overtime hours in an e-mail to M.D. Anderson's human resources department. (Doc. 8 ¶ 16.) On February 10, 2010, Diaz received a written warning, stating that she had "violated the Health Insurance Portability and Accountability Act ('HIPAA') and require[ing] her to attend HIPAA compliance training." (*Id.* at ¶ 17.) On April 21, 2010, Diaz was terminated. (Doc. 15-3 ¶ 5.)

On June 23, 2010, Diaz filed the instant suit against M.D. Anderson. (Doc. 1.) On August 6, 2010, M.D. Anderson moved to dismiss the suit, arguing that, as part of the University of Texas System and an entity of the State of Texas, it is entitled to immunity under the Eleventh Amendment. (Doc. 4 at 3.) On September 17, 2011, Diaz amended her complaint, replacing M.D. Anderson with the individual Defendants Falchook, Pilat, and Kurzrock. (Doc. 8.) The individual Defendants now move for summary judgment. (Doc. 15.)

II. Standard of Review

A party moving for summary judgment must inform the court of the basis for the motion and identify those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, that show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The substantive law governing the suit identifies the essential elements of the claims at issue and therefore indicates which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The initial burden falls on the movant to identify areas essential to the nonmovant's claim in which there is an "absence of a genuine issue of material fact." *Lincoln Gen. Ins. Co. v. Reyna*, 401 F.3d 347, 349 (5th Cir. 2005). If the moving party fails to meet its initial burden, the motion must be denied, regardless of the adequacy of any response. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc). Moreover, if the party moving for summary judgment bears the burden of proof on an issue, either as a plaintiff or as a defendant asserting an affirmative defense, then that party must establish that no dispute of material fact exists regarding all of the essential elements of the claim or defense to warrant judgment in his favor. *Fontenot v. Upjohn*, 780 F.2d 1190, 1194 (5th Cir. 1986) (the movant with the burden of proof "must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in his favor") (emphasis in original).

Once the movant meets its burden, however, the nonmovant must direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact for trial. *Celotex*, 477 U.S. at 323–24. The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Electric Indust. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (citing *U.S. v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)). Instead, the nonmoving party must produce evidence upon which a jury could reasonably base a verdict in its favor. *Anderson*, 477 U.S. at 248; *see also DIRECTV Inc. v. Robson*, 420 F.3d 532, 536 (5th Cir. 2005). To do so, the nonmovant must "go beyond the pleadings and by [its] own affidavits or by depositions, answers to interrogatories and admissions on file, designate specific facts that show there is a genuine issue for trial." W*ebb v. Cardiothoracic Surgery Assoc. of N. Tex., P.A.*, 139 F.3d 532, 536 (5th Cir. 1998). Unsubstantiated and subjective beliefs and conclusory allegations and opinions of fact are not competent summary judgment evidence. *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998); *Grimes v. Tex. Dept. of Mental Health and Mental Retardation*, 102 F.3d 137, 139–40 (5th Cir. 1996); *Forsyth v. Barr*, 19 F.3d 1527, 1533 (5th Cir. 1994), *cert. denied*, 513 U.S. 871 (1994); *Topalian v. Ehrman*, 954 F.2d 1125, 1131 (5th Cir. 1992), *cert. denied*, 506 U.S. 825 (1992). Nor are pleadings summary judgment evidence. *Wallace v. Tex. Tech Univ.*, 80 F.3d 1042, 1046 (5th Cir. 1996) (citing *Little*, 37 F.3d at 1075). The nonmovant cannot discharge his burden by offering vague allegations and legal conclusions. *Salas v. Carpenter*, 980 F.2d 299, 305 (5th Cir. 1992); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990). Nor is the court required by Rule 56 to sift through the record in search of evidence to support a party's opposition to summary judgment. *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998) (citing *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915–16 & n.7 (5th Cir. 1992)).

Nevertheless, all reasonable inferences must be drawn in favor of the nonmoving party. *Matsushita*, 475 U.S. at 587–88; *see also Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 412 (5th Cir. 2003). Furthermore, the party opposing a motion for summary judgment does not need to present additional evidence, but may identify genuine issues of fact extant in the summary judgment evidence produced by the moving party. *Isquith v. Middle South Utilities, Inc.*, 847 F.2d 186, 198–200 (5th Cir. 1988). The nonmoving party may also identify evidentiary documents already in the record that establish specific facts showing the existence of a genuine issue. *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 178 (5th Cir. 1990).

III. Discussion

In an FLSA case, the employee bears the initial burden of establishing a prima facie case that a violation has occurred. *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317, 1330 (5th Cir. 1985). This burden includes the "threshold issue of whether an employer-employee relationship exists." *Reich v. ConAgra, Inc.*, 987 F.2d 1357, 1360 (8th Cir. 1993) (quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 686–87 (1946) (reversing summary judgment for improperly placing the burden of proof of employer status on alleged employer)); *Barry v. Town of Elma*, No. 02-CV-344, 2004 WL 2980758, at *6 (W.D.N.Y. Dec. 23, 2004) (holding that employee "has the burden of establishing (at a minimum) that material issues of fact exist as to whether the individual defendants were his 'employer' for FLSA purposes."). The classification of an employer under the FLSA is a matter of law for the Court to decide. *Beliz*, 765 F.2d at 1327–29 ("[B]oth the weight of our decisions and the weight of authority in other circuits support the characterization as one of law, while, of course, subsidiary findings are of fact."); *Cromwell v. Driftwood Elec. Contractors, Inc.*, 348 Fed. Appx. 57 (5th Cir. 2009).

An employer under the FLSA "includes any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d). A "person" is "an individual, partnership, association, corporation, business trust, legal representative, or any organized group of persons." *Id.* § 203(a).

The individual Defendants argue that they are not "employers" as defined by the FLSA. (Doc. 15 at 4.) Diaz "worked for M.D. Anderson, not Defendants. . . . Plaintiff's only employer was M.D. Anderson." (Doc. 15 at 2, 16.) Diaz responds that "each of the Defendants possessed and exercised sufficient authority over the Department—and Diaz—to be deemed 'employers' under the FLSA." (Doc. 18 at 9.)

Under the FLSA, a single individual may be the employee of two or more employers at the same time. *Itzep v. Target Corp.*, 543 F. Supp. 2d 646, 652 (W.D. Tex. 2008). Each employer may be jointly and severally liable for damages resulting from the failure to comply with the FLSA. *Lee v. Coahoma County, Mississippi*, 937 F.2d 200, 226 (5th Cir. 1991), *mod. on other grounds*, 37 F.3d 1068 (5th Cir. 1993). The court determines whether an individual is an employer based on "economic reality rather than technical concepts." *Goldberg v. Whitaker House Co-op., Inc.*, 366 U.S. 28, 32 (1961); *Dole v. Simpson*, 784 F. Supp. 538, 545 (S.D. Ind. 1991) ("Addressing the 'economic realities' of individual cases, courts have found liable individuals occupying a various range of corporate positions and exercising various degrees of control."); *Solis v. Universal Project Mgmt., Inc.*, 2009 WL 4043362, at **6–7 (S.D. Tex. Nov. 19, 2009) (denying motion for summary judgment by employers who only state that they did not personally employ or enter into contracts with claimants, and that all actions were taken on behalf of the company, without addressing the economic reality requirements); *Osborn Computer Scis. Corp.*, 2005 WL 5878602, at *2 (W.D. Tex. Sept. 23, 2005) (denying motion for summary judgment by mid-level supervisor who "had the power to hire, fire, and reassign" employee).

An employer under the FLSA must generally have the power to hire and fire an employee. *Goldberg*, 366 U.S. at 32. The FLSA defines "to employ" as "to suffer or permit to work." 29 U.S.C. § 203(g). However, the classification of an employer "does not depend on . . . isolated factors but rather upon the circumstances of the whole activity." *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 730 (1947). The court must consider the "economic reality of the entire situation." *Beliz*, 765 F.2d at 1327–29. The court may consider factors such as "whether the alleged employer (1) has the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Watson v. Graves*, 909 F.2d 1549, 1553 (5th Cir. 1990) (internal quotations omitted).

To determine whether an individual within a corporation, rather than the corporation itself, is an employer under the FLSA, courts look to whether the officer "effectively dominates [the corporation's] administration or otherwise acts, or has the power to act, on behalf of the corporation vis-à-vis its employees." *Reich v. Circle C Invs. Inc.*, 998 F.2d 324, 329 (5th Cir. 1993). The officer must "independently exercise control over the work situation." *Donovan v.*

Grim Hotel Co., 747 F.2d 966, 972 (5th Cir. 1984); *see Baxter v. McClelland*, 2001 WL 4577658, at *4 (S.D. Tex. Nov. 5, 2010) ("The question is not whether the individual defendants, together, exert sufficient control to be considered an employer, it is whether each defendant, standing alone, has sufficient control to be held liable as an employer for alleged violations of the FLSA.").

In *Grim Hotel*, the court emphasized the fact than an individual defendant found to be an employer under the FLSA had the sole power to "authorize compliance with the [FLSA]." *Grim Hotel*, 747 F.2d at 972. Holding accountable administrators lacking such authority would subvert the purpose of the FLSA.

> Too much weight cannot be put on the Act's broadly inclusive definition of "employer." Taken literally and applied in this context it would make any supervisory employee, even those without any control over the corporation's payroll, personally liable for the unpaid or deficient wages or other employees. It makes more sense . . . to interpret the language as intended to prevent employers from shielding themselves from responsibility for the acts of their agents.

Donovan v. Agnew, 712 F.2d 1509, 1513 (1st Cir. 1983). Courts "generally reject the belief that a low-level supervisor of other employees can be individually liable." *Rudy v. Consolidated Rest. Co., Inc.*, 2010 WL 3565418, at *5 (N.D. Tex. Aug. 18, 2010); *see Baystate Alternative Staffing, Inc. v. Herman*, 163 F.3d 668, 678 (1st Cir. 1998) (holding that individuals who "exercised some degree of supervisory control over the workers" but did not control "purse-strings" or "corporate policy" were not employers).

Defendant Falchook testifies that he did not "have the authority to hire [his] own staff [and] did not have the authority to unilaterally terminate Ms. Diaz." (Doc. 15-3 ¶¶ 3, 5.) Nevertheless, Diaz's position was created at Falchook's request. (*Id.* ¶ 3.) Falchook testifies,

> I interviewed Ms. Diaz and decided that she was qualified for the

> position. I told Susan Pilat of my decision, and an offer of employment was extended to Ms. Diaz by a member of M.D. Anderson's Recruitment office. . . . I made the decision to terminate Ms. Diaz with the approval of my Department Chair Dr. Razelle Kurzrock, our department's Research Nurse Manager Susan Pilat, and with the approval and advice of the Human Resources and Legal Departments at M.D. Anderson.

(Doc. 15-3 ¶¶ 3, 5.) Under the economic realities test, Falchook appears to have had substantial power to hire and fire Ms. Diaz, as well as to control her "work schedule[] or conditions of employment." *Watson*, 909 F.2d at 1553. Diaz states:

> In addition to reporting to Ms. Pilat, I also reported to Dr. Falchook, as he was head of the team. . . . Dr. Falchook is the individual who informed me that I would be performing data entry (as opposed to continuing to work in the clinic), and he held meetings with me to inquire as to the status of my data entry. Dr. Falchook also approved or disapproved my requests for time off, and he provided me with a written reprimand concerning issues he had with my work performance. Dr. Falchook also attended and participated in meetings with me regarding my performance and my termination of employment.

(Doc. 18-1 ¶¶ 4, 6.)

Falchook, however, did not decide Diaz's "rate or method of payment." (Doc. 15-3; *see also Watson*, 909 F.2d at 1553 ("The 'economic reality' test includes inquiries into whether the alleged employer . . . determined the rate and method of payment." (internal quotation omitted)). Falchook did not maintain Diaz's employment records or "classify Ms. Diaz as exempt, and . . . was not involved in the classification process." . (Doc. 15-5 ¶ 4; Doc. 15-3 ¶ 3.) Falchook testifies, "I was not involved in . . . overall institutional administration. . . . When Ms. Diaz complained about her overtime, I did not have the authority to pay her overtime, and she was referred to Human Resources for further discussions." (Doc. 15-3 ¶ 4.) Falchook lacked the ability to "authorize compliance with the [FLSA]." *Grim Hotel*, 747 F.2d at 972.

Diaz testifies that Defendant Pilat "attended and participated in meetings with me regarding . . . my termination of employment." (Doc. 18-1 ¶ 5.) Pilat served as Diaz's direct supervisor. (Doc. 18 at 2.) Diaz testifies:

> On my first day, I attended a Human Resources orientation meeting, at which time I was informed that I would be reporting to Ms. Pilat. Various documents that I was provided . . . further indicated that Ms. Pilat was my direct supervisor. . . . [S]he coached and corrected me while I was performing my duties in the clinic; . . . she provided me with a written reprimand concerning issues she had with my work performance; she met with me concerning my request for a reasonable accommodation under the Americans with Disabilities Act; she met with me regarding my progress on data entry; she reviewed and approved or disapproved my requests for time off; and in response to my observation that I often was required to work through lunch in order to complete my work, Ms. Pilat remarked, "Lunch is a luxury," and that there is "no comp[ensatory] time" for working in excess of 40 hours in a work week.

(Doc. 18-1 ¶ 5 (brackets in original).)

Pilat testifies, "I did not have the authority to extend a job offer to Ms. Diaz, though I did interview her and requested her hire to M.D. Anderson using the institutional hiring process. . . . I did not have the authority to unilaterally terminate Ms. Diaz." (Doc. 15-2 ¶ 3.) Pilat "did not set [Diaz's] pay rate or method of payment," and did not maintain Diaz's employment records. (Doc. 15-2 ¶ 3; Doc. 15-5 ¶ 4.) Further, Pilat "did not classify Ms. Diaz as exempt and was not involved in the classification process . . . [or] overall institutional administration." (Doc. 15-2 ¶ 4.) Pilat acknowledges that "Ms. Diaz once informed me that she had worked past 5 p.m. and I responded that she could take the extra hours off on another date and referred [her] to Human Resources for further discussions." (*Id.*)

Defendant Kurzrock testifies,

> I did not interview, hire, or request that anyone else specifically hire Ms. Diaz. . . . I did not coordinate, supervise, manage or control Ms. Diaz's day-to-day activities. I did not set her pay rate or method of payment. . . . I did not classify Ms. Diaz as exempt

> and I was not involved in the classification process. . . . I have no authority over the day-to-day management of M.D. Anderson institutional operations even as they pertain to my department. For example, I do not determine the pay scale for positions or whether or not the positions are exempt or non-exempt. . . . Ms. Diaz did not complain to me about her overtime and I did not have the authority to unilaterally terminate Ms. Diaz.

(Doc. 15-6 ¶¶ 4–6.) Kurzrock did not maintain Diaz's employment records. (Doc. 15-5 ¶ 4.) Diaz argues that Kurzrock was her employer based on the following facts: (1) Diaz "worked with Dr. Kurzrock with respect to patients of hers"; (2) Diaz attended meetings in which Kurzrock spoke about departmental policies; (3) Kurzrock sent her group emails; and (4) Diaz and Kurzrock engaged in an e-mail exchange. (Doc. 18-1 ¶ 7.) Diaz testifies that during their e-mail exchange, Kurzrock "replied directly to me instructing me as to policy and making specific requests for me to do certain tasks." (*Id.*)

None of the individual Defendants in this case had control over the overtime wages Diaz seeks to recover. Defendants explain that "[d]ue to the decentralized nature of M.D. Anderson's institutional infrastructure, [they] had no involvement in or influence on Diaz's exempt classification . . . and had no authority to pay her overtime compensation." (Doc. 15 at 10, 12.) While Defendants Falchook and Pilat appear to have acted as her employer in some respects, they cannot be held liable for violations occurring outside their area of authority in the organization. *Baird v. Kessler*, 172 F. Supp. 2d 1305, 1312 (E.D. Cal. 2001) ("Congress [never] intended to make each individual manager and officer within a business, public or private, personally liable for violations of the FLSA, when a manager or officer cannot control the very things which may lead to violation of the FLSA.").

Diaz's compensation and her classification as an exempt employee was determined by a compensation analyst in the human resources department at M.D. Anderson. (Doc. 15-4 ¶ 3.)

Her compensation was then approved by the Division of Cancer Medicine Administrator, the Office of the Provost, the Financial Forecasting and Analysis Department and the Grants Department. (Doc. 15-4 ¶ 3.) When Diaz complained to Defendants Falchook and Pilat about unpaid overtime wages, they referred her to the human resources department. (Doc. 15-2 ¶ 4; Doc. 15-3 ¶ 4.) Diaz, however, does not name defendants from the human resources department. In her original Complaint, Diaz alleged that M.D. Anderson had an institution-wide policy or practice of failing to pay overtime wages to Clinical Studies Coordinators and that M.D. Anderson "knew or should have known that its policies and practices violated the FLSA." (Doc. 1 at ¶ 17.) Only after M.D. Anderson filed a motion to dismiss due to sovereign immunity did Diaz amend her complaint to sue the individual Defendants. (Doc. 8.) Given Defendants respective positions within the bureaucracy of M.D. Anderson, the Court finds they were not Diaz's employers under the FLSA.

In the alternative, the Defendants argue that, as government officials, they are entitled to qualified immunity from Diaz's claims. The doctrine of qualified immunity protects officials from civil suits "if their conduct does not violate clearly established statutory or constitutional law of which a reasonable person would have known." *Modica v. Taylor*, 465 F.3d 174, 179 (5th Cir. 2006). The standard for qualified immunity is a two-part test:

> First, the court must decide whether a plaintiff's allegations, if true, establish a violation of a clearly established right. Second, if the plaintiff has alleged a violation, the court must then decide whether the conduct was objectively reasonable in light of clearly established law at the time of the incident.

Id. Diaz argues that overtime wages are "longstanding and well-established law." (Doc. 18 at 15.) She further argues:

> in light of Defendants' respective supervisory positions over Diaz as Chair, Research Nurse Manager, and Assistant Professor—and

> in light of the fact that Diaz complained that she was not receiving overtime pay under the FLSA and Pilat informed her there was no "comp[ensatory] time"—Defendants had a duty to ensure that Diaz was properly classified . . . .

(*Id.* at 16 (brackets in original).) Defendants point out that they referred Diaz to the human resources department for further discussion. (Doc. 20 at 9.) Even if this referral were found to fall short of a duty to check whether Diaz's concerns had been properly addressed, it was not objectively unreasonable under the circumstances. Defendants respective positions at M.D. Anderson gave them no direct authority over Diaz's compensation or classification as an exempt employee. The Court finds that Defendants are entitled to qualified immunity.

Diaz also brings a retaliation claim under the FLSA. 29 U.S.C. § 215(a)(3). Retaliation against an employee cannot be objectively reasonable, so qualified immunity is not an applicable defense. *Modica*, 465 F.3d at 179. Diaz argues that, regardless of the individual Defendants' status as her employers under the FLSA, they are still liable for retaliation. (Doc. 23 at 2.) The retaliation provision of the FLSA makes it "unlawful for any *person* . . . to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter." 29 U.S.C. § 215(a)(3) (emphasis added). Diaz cites one district court case in which a court found, under very different factual circumstances, that the retaliation provision of the FLSA may apply to persons who are not employers. *Montano-Perez v. Durrett Cheese Sales, Inc.*, 666 F. Supp. 2d 894, 901 (M.D. Tenn. Oct. 13, 2009) (finding that retaliation against undocumented workers by police officers who were not FLSA employers was facially plausible). The court noted that, although it was denying the police officers' motion to dismiss, it had not resolved the issue of what relief might be granted to the workers:

> While the County Defendants note that the issue of non-employer

> civil liability for FLSA violations is apparently one of first impression in this circuit, at least one court outside of the circuit has found that, while "any person" can violate the FLSA, the remedial scheme established by Congress only permits private plaintiffs to sue employers for civil remedies under the FLSA. *See O'Brien v. Dekalb-Clinton Counties Ambulance District*, 1996 WL 565817, at *5 (W.D. Mo. Jun. 24, 1996). Further briefing on this issue in conjunction with any summary judgment motions would be welcome.

The case settled, and the court never determined whether the defendants were liable for retaliation.

In the instant case, Diaz seeks damages under § 216(b) for retaliation pursuant to § 215(a)(3). Section 216(b) only provides for the liability an "employer" who violates § 215(a)(3). 29 U.S.C. § 216(b); *see* Doc. 8 ¶ 5 ("Diaz's claims arise under section 16(b) of the FLSA."); *see also Goetz v. Synthesys Tech., Inc.*, 286 F. Supp. 2d 796, 803 (W.D. Tex. 2003) ("Liability under § 215(a)(3), like all FLSA provisions, only extends to 'employers.'"). As the Court has already found that the individual Defendants were not Diaz's employers under the FLSA, Diaz therefore fails to state a legal basis for relief.

Diaz also fails to make a prima facie case for retaliation under the *McDonnell* burden-shifting analysis for discrimination claims. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). As applied to FLSA cases, *McDonnell* requires plaintiffs to "make a prima facie showing of (1) participation in protected activity under the FLSA; (2) an adverse employment action; and (3) a causal link between the activity and the adverse action." *Hagan v. Echostar Satellite, L.L.C.*, 529 F.3d 617, 624 (5th Cir. 2008). A causal link may be established by "mere temporal proximity between an employer's knowledge of protected activity and an adverse employment action" if the proximity is "very close." *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001).

Diaz alleges that the first incident of retaliation occurred on February 10, 2010, nearly two months after her first FLSA-protected complaint to the human resources department regarding unpaid overtime. (Doc. 8 ¶ 17.) The alleged retaliation incident consisted of the issuance of a "performance improvement plan" and a requirement that Diaz attend HIPAA compliance training. (*Id.*; Doc. 18, Falchook Dep. at 41.) Diaz admits that the warning letter concerned "issues [Falchook and Pilat] had with [her] work performance." (Doc. 18-1 ¶¶ 5, 6.) A written warning does not constitute an adverse employment action:

> [O]nly an "ultimate employment decision" by an employer can form the basis for liability for retaliation. . . . [A]ctivities that do not constitute an "ultimate employment decision" include reprimands, rude treatment, criticism of work and conduct, threats of potential dismissal, verbal reprimands, or low evaluations.

Conner v. Celanese, Ltd., 428 F. Supp. 2d 628, 638 (internal citations omitted). As for the training program, Diaz provides no evidence that it was adverse rather than beneficial, or that it was not simply intended to help her improve her work performance so that she might continue working at M.D. Anderson.

Diaz was not terminated until four months after her FLSA-protected complaint about unpaid overtime. (Doc. 15-2 ¶ 5; Doc. 15-3 ¶ 5.) The court in *Breeden* did not specify how many months would be considered "very close," but it cited approvingly *O'Neal v. Ferguson Construction Co.*, 237 F.3d 1248 (10th Cir. 2001), holding that a three month period was insufficient to establish causation. *Breeden*, 532 U.S. at 273. The Fifth Circuit has indicated that "up to four months" was formerly sufficient, but that may no longer be the case:

> In *Evans v. City of Houston*, 246 F.3d 344, 355 (5th Cir. 2001) (issued prior to *Breeden*), this court found that a five-day lapse . . . was sufficient . . . . At the time of *Evans*, courts in this circuit had found temporal proximity of up to four months to be sufficient to show a causal link. More recently, we have further clarified the meaning of "very close." We have held that a five-month lapse, by

> itself, does not support an inference of a causal link. In unpublished decisions, we have narrowed the range. For example, we concluded that two and a half months is a short enough period to support an inference of a causal link. Similarly, we found a fifteen-day lapse sufficiently close to support an inference of causation.

Stroud v. BMC Software, Inc., 2008 WL 2325639, at *5 (5th Cir. June 6, 2008). The Court finds that Diaz's termination did not follow her complaint closely enough to constitute retaliation.

Under the *McDonnell* burden-shifting framework, if a plaintiff succeeds in making a prima facie showing of retaliation, "the defendant must then articulate a legitimate, non-discriminatory reason for its decision. Then the burden shifts to the plaintiff to demonstrate that the proffered reason is a pretext for discrimination." *Hagan*, 529 F.3d at 624. Defendants explain that Diaz was terminated "due to her unsatisfactory job performance and unacceptable conduct related to her failure to improve certain aspects of her conduct and work performance." (Doc. 15-3 ¶ 5; Doc. 15-2 ¶ 5.) In light of the record of Defendants' communication of their concerns regarding Diaz's work performance by e-mail and in person over a period of four months, as well as the provision of training to improve her performance, the Court finds Defendants' explanation "legitimate" and "non-discriminatory." *Hagan*, 529 F.3d at 624. Diaz argues that additional discovery is necessary "concerning the issues surrounding her termination of employment," on grounds that Defendants did not raise her retaliation claim in the motion before the Court. (Doc. 23 at 3.) Diaz points to a comment by defense counsel: "I think that my [motion for summary judgment] didn't mention retaliation at all." (Doc. 18-3, Pilat Dep. at 93:13.) However, Defendants' motion states, "Plaintiff's FSLA claims include . . . a claim for retaliation." (Doc. 15 at 6 n.3.) Assuming, arguendo, that Diaz were able to establish a prima facie case of retaliation, she nevertheless fails to show that Defendants' reason for termination was pretextual.

IV. Conclusion

Accordingly, the Court hereby **ORDERS** that Defendants Gerald Falchook, M.D., Susan R. Pilat, and Razelle Kurzrock, M.D.'s Motion For Summary Judgment (Doc. 15) is **GRANTED**.

SIGNED at Houston, Texas, this 12th day of August, 2011.

MELINDA HARMON
UNITED STATES DISTRICT JUDGE